

BEFORE THE
PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA
DOCKET NO. 2019-388-E

IN RE:	Denmark Solar, LLC; Trask East Solar, LLC;)	
	Yemassee Solar, LLC; and Blackville Solar)	
	Farm, LLC)	
)	
	Petitioners,)	ANSWER
)	
	Dominion Energy South Carolina,)	
	Inc.,)	
)	
	Respondent.)	
	_____)	

Pursuant to S.C. Code Ann. Regs. § 103-826 and other applicable rules of practice and procedure of the Public Service Commission of South Carolina (“Commission”), Dominion Energy South Carolina, Inc. (formerly South Carolina Electric & Gas Company) (“DESC”) hereby answers the Petition filed by Blackville Solar Farm, LLC (“Blackville”), Denmark Solar, LLC (“Denmark”), Trask East Solar, LLC (“Trask East”), and Yemassee Solar, LLC (“Yemassee”), on December 19, 2019, in the above-referenced docket (the “Petition”). DESC is named as the Respondent in the Petition,¹ and, as described in detail below, DESC has an interest in this proceeding to ensure that its customers are not harmed by a decision in favor of Petitioners, the policy objectives of S.C. Act No. 62 of 2019 (“Act 62”) are upheld, and that the sanctity of the contracts entered into by DESC is preserved.

BACKGROUND

Blackville, Denmark, Trask East, and Yemassee (collectively, the “Petitioners”) each plan to construct a solar generating facility that will be a Qualifying Facility as defined by Federal

¹ To the extent any material allegation of the Petition requires a specific admission or denial, and the same is not addressed herein, such allegation is specifically denied. DESC stipulates that the power purchase agreements in dispute speak for themselves, and DESC has no knowledge—as detailed below—of Petitioners’ inability to obtain financing or whether such financing could be completed in accordance with Petitioners’ proposed timeline.

Energy Regulatory Commission (“FERC”) Regulation 18 C.F.R. § 292.204. Each of the Petitioners entered into an Interconnection Agreement (“IA”) and Power Purchase Agreement (“PPA”) with DESC. Each Petitioner executed its respective (i) IA with DESC on October 23, 2017, and (ii) PPA with DESC on May 26, 2018. Each Petitioner plans to sell the output of their facility to DESC via the PPA. The executed PPAs for the Petitioners are attached hereto as Exhibit 1, Exhibit 2, Exhibit 3, and Exhibit 4, respectively.

Additionally, Petitioners’ parent company—Southern Current, LLC (“Southern Current”)—executed a PPA for several other projects that it has since sold. These projects include Blackville Solar II, LLC, Diamond Solar, LLC, Edison Solar, LLC, and Richardson Solar, LLC (collectively, the “Other VIC Projects”). The following lists the execution dates of the IAs and PPAs for each of the Other VIC Projects:

	IA	PPA
Blackville Solar II, LLC	January 3, 2017	June 1, 2017
Diamond Solar, LLC	September 23, 2016	June 1, 2017
Edison Solar, LLC	September 1, 2016	June 1, 2017
Richardson Solar, LLC	July 7, 2017	June 1, 2017

The executed PPAs for the Other VIC Projects are attached hereto as Exhibit 5, Exhibit 6, Exhibit 7, and Exhibit 8, respectively. Southern Current separately negotiated the IAs and PPAs for the Petitioners and the Other VIC Projects with DESC, and each PPA was filed with the Commission.

All of the PPAs that Southern Current negotiated with DESC for Petitioners and the Other VIC Projects contain the following language in Section 5.2(b) of the PPA (the “VIC Language”):

Seller shall be responsible for the payment of all charges that result from any change in any applicable law that occurs after the Effective Date that **imposes new or additional . . . variable integration charges** . . . imposed, assessed or credited by the transmission provider based on the impacts of energy generated by variable generation projects generally. (emphasis added)

Essentially, the VIC Language permits DESC to implement a variable integration charge (a “VIC”) upon counterparties to the PPA in order to recover certain costs it incurs to maintain reliability on its system that are caused by the inherent variability in operation and, therefore, variability in generation output of the renewable energy facility. In other words, Southern Current knew because of the operating limitations of its solar facilities that it was only a matter of time before DESC would seek to impose a VIC.

DESC submitted a filing with the Commission on February 8, 2019, in Docket No. 2019-2-E (the “DESC VIC Proposal”), in which it first set forth a proposed value for the VIC. Although the amount of the VIC proposed by DESC was ultimately modified by the Commission, the Commission did approve imposition of a VIC and set forth an interim value for the VIC in its order entered on December 9, 2019, as modified by the Directive entered on January 3, 2020, in Docket No. 2019-184-E (the “VIC Order”). The interim VIC value set by the Commission was \$0.96/MWh, and the Commission intends for this value to be in place until the Commission is provided with the results of an integration study performed at its direction.

However, now Petitioners come with the Petition alleging that the VIC Language, the DESC VIC Proposal, and the VIC Order has rendered each Petitioner unable to fulfill its obligations under the PPA. Specifically, Petitioners state that the “sheer uncertainty as to what VIC might ultimately be approved by the Commission” has prohibited Petitioners from obtaining financing in time to achieve the Completion Date (as defined in the PPA) by the deadline set forth in their respective PPA. Petition at 5.

As a result, Petitioners make the unsupported request that the Commission amend each PPA to extend the Completion Date—and all associated milestones—“until 12 months after the Commission issues an Order on this Petition, to allow the Projects time to obtain financing and

complete construction.” Petition at 6. For the reasons set forth below, DESC respectfully requests that this Commission deny the relief sought by Petitioners in the Petition.

RESPONSE TO ALLEGATIONS OF PETITION

I. The Petition fails to provide a basis for relief.

The Commission’s review of the Petition is governed by S.C. Code Ann. Reg. § 103-819, which requires the Petition provide a “concise and cogent statement of the facts.” Nowhere do Petitioners actually provide DESC or this Commission with a “concise and cogent statement” of their specific efforts to obtain the financing necessary to achieve the Completion Date, or provide evidence of even the slightest support showing how any such efforts were adversely affected by the VIC Language, the DESC VIC Proposal, or the VIC Order. For example, Petitioners have not (i) named any potential financing parties, (ii) cited any adverse communications received from a potential financing party as to the VIC Language, the DESC VIC Proposal, or the VIC Order—issued only 10 days before the Petition was filed, or (iii) proposed any action that, if taken by the Petitioners, would be sufficient to obtain financing to achieve the Completion Date—even on an extended timeline. All of these things and more are required by the Commission’s own regulations when filing a Petition.

Although Petitioners cite “sheer uncertainty” as the culprit that sent their financing efforts awry, Petitioners have yet to explain how the VIC Language, the DESC VIC Proposal, or the VIC Order—which actually quantified the VIC value—created “uncertainty” that did not exist at the time Petitioners executed the PPAs. Petitioners do not even articulate what the alleged “uncertainty” is. Indeed, the Other VIC Projects, which all contained the VIC Language in their respective PPA, have apparently encountered no financing issues as a result of the VIC Language—in fact, the Other VIC Projects were so successful that Southern Current was able to sell them to another developer. Financing was secured despite the fact that Southern Current had

no forecasts from DESC or the Commission whatsoever of what the VIC value might be, but only knew that the VIC Language allowed DESC to impose a VIC pursuant to the terms of the PPA.

Curiously, Southern Current claims that, in order to obtain financing, “the projected revenues from the project [must] be reasonably certain . . . and there [must be] no circumstances calling into question the Project’s ability to deliver on the commitments in the IA or the PPA.” Petition at 4. Adopting this view, this must mean that the projected revenues from the Other VIC Projects were “reasonably certain” and that the Other VIC Projects eliminated all “circumstances calling into question” their ability to deliver on their contractual commitments because they did indeed obtain financing and achieve the Completion Date in accordance with their respective PPA. However, the PPA for each of the Other VIC Projects contained the now complained of VIC Language. Therefore, given Southern Current’s experience, it must be that the VIC Language and DESC’s corresponding ability to impose an open-ended VIC does not impose the uncertainty that Petitioners claim. Given that (i) DESC’s and Southern Current’s experience evidences that the VIC Language does not create the uncertainty claimed by Petitioners, and (ii) projects can be financed with the VIC Language in their PPA, the claim of uncertainty, along with the complete absence of support, is disingenuous.

Essentially, Petitioners only put forth conclusory allegations in the Petition because they are unable to produce any reliable support or evidence that the VIC Language, the DESC VIC Proposal, or the VIC Order hindered any actual efforts to obtain financing in any way. In fact, the only actual evidence before this Commission is that the Other VIC Projects that contain VIC Language in their respective PPA were able to obtain financing. As a result, it appears that Petitioners either had speculative projects or simply mismanaged the logistics and corresponding timeline for the projects—facts that find no basis for relief under the PPA. Because of Petitioners’ failure to allege facts or provide an adequate basis for relief, the Commission should

deny the relief requested in the Petition as a matter of law.

II. Modification of the PPAs is not in the public interest and violates established fundamental principles of contract.

Although the Commission has the authority to amend or modify these PPAs pursuant to S.C. Code § 58-27-980, the Commission must only do so when the “public interest so requires.” (emphasis added). Modifying Petitioners’ PPAs is not within the public interest required by S.C. Code § 58-27-980. Indeed, like the bare claims relating to their inability to obtain financing, Petitioners assert no public interest justifying the abrogation of these contracts, and Petitioners leave it to the Commission to decipher the public interest that Petitioners assert requires this extraordinary step. Indeed, it cannot be said that a recognized public interest—such as protecting the ratepayers of South Carolina—is at stake, and nowhere have Petitioners even mentioned the same. Granting the relief requested in the Petition would not contribute to the reliability of DESC’s system or benefit DESC’s customers as a whole. There is no public interest which supports granting the relief in the Petition, and it would actually be against the public interest to grant such relief because it would bring true uncertainty to each PPA within this Commission’s jurisdiction.

Rather, Southern Current is a sophisticated party that has negotiated multiple IAs and PPAs with DESC. Southern Current and Petitioners were aware of the VIC Language when they negotiated these PPAs because they executed PPAs with identical VIC Language almost a year earlier for the Other VIC Projects. Not only was Southern Current aware of the VIC Language when Petitioners entered into these PPAs, but it was also well aware of the risks it assumes each time it seeks to develop a project in DESC’s service territory. In fact, Southern Current’s President and CEO, John Downey, testified in front of the Commission, in Docket No. 2019-184-E, that Southern Current takes on “substantial capital risks” when developing and constructing

renewable energy facilities, and that Southern Current is required to “mitigate impacts [to profitability] by properly managing project development.” Transcript of Merits Hearing in Docket No. 2019-184-E - Volume 2 (Uncertified transcript) at 118 and 119 (October 15, 2019). Indeed, one of these “capital risks” is that DESC may impose a VIC pursuant to the terms of the PPA. Apparently, a properly managed project would have avoided the pitfalls now faced by Petitioners—as did the Other VIC Projects. However, in a matter of months after such testimony, Petitioners are advocating a seemingly opposing message than the one presented to this Commission by Mr. Downey. That is, rather than emphasizing the risks undertaken by Southern Current in each of these projects, Petitioners now seem to require that every risk that “[calls] into question [any Petitioner’s] ability to deliver on its commitments in the PPA” be eliminated. Petition at 4. Amending four PPAs to bail out Petitioners as a result of (i) risks they are accustomed to assuming (and proudly acknowledged such in front of this Commission—regardless of the conflicting statements set forth in the Petition) and (ii) language in contracts that they negotiated and executed is a far cry from the “public interest” required to intervene and amend these contracts under South Carolina law.

Fundamentally, Petitioners complain of DESC simply exercising its contractual right under the PPAs to impose a VIC upon counterparties that negotiated PPAs containing the VIC Language. It appears that when Petitioners plea for the Commission to modify these PPAs in the “public interest” (a phrase only quoted once in the Petition, but never argued or supported), what Petitioners truly mean is that the Commission should modify them in Petitioners’ interest. Indeed, Petitioners would readily argue that it would be unfair and violate their contracted-for rights for the Commission to revise the terms of the PPAs for the Other VIC Projects to claw back profits made from the sale of those projects and return those savings to South Carolina ratepayers. In such a situation, Petitioners would surely ask this Commission to respect the

sanctity of a contract—despite a recognized public interest of protecting ratepayers in South Carolina.

Here, DESC simply asks the Commission to respect the sanctity of a contract and provide a signal of stability and predictability from this Commission in denying the relief requested in the Petition, thereby ensuring that contracts can be relied upon, all while minimizing the risks placed upon the ratepayers in South Carolina.

III. Modification of the PPAs would violate South Carolina law and established fundamental principles of contract.

The Commission is empowered by Act 62 to ensure that terms and conditions of PPAs approved by this Commission be “just and reasonable to the ratepayers . . . nondiscriminatory to small power producers; and [strive] to reduce the risk placed on the using and consuming public.” The issues here are of the type the Commission must mitigate pursuant to its mandate under Act 62—a developer seeking preferential treatment that, if granted, would create construction delays, divert DESC’s resources from projects that are progressing in accordance with their respective PPAs, and increase costs to the ratepayers of South Carolina and the utility itself. Indeed, other projects have had success operating under PPAs containing the VIC Language—including the Other VIC Projects that were developed and sold by Southern Current. As such, DESC cannot simply amend these PPAs to modify the construction schedule (i) in a preferential manner or (ii) contrary to the express terms of the PPA. Petitioners are not uniquely impacted by the VIC Language, the DESC VIC Proposal, the VIC Order, or any related Commission decision, and they do not allege any special or unique circumstances which justify disparate treatment from other similarly-situated developers. In short, nothing provided by the Petitioners justifies this Commission proceeding against its mandate in Act 62 to violate the sanctity of these PPAs—which were negotiated and agreed to by the Petitioners.

CONCLUSION

For the reasons stated above, the relief requested in the Petition should be denied.

[SIGNATURE PAGE FOLLOWS]

Respectfully Submitted,

/s/ J. Ashley Cooper

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*Attorneys for Dominion Energy South Carolina,
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Cayce, South Carolina
January 21, 2020

**BEFORE THE
PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA
DOCKET NO. 2019-388-E**

IN RE:	Denmark Solar, LLC; Trask East Solar, LLC;)	
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	_____)	

This is to certify that I, Ashley Cooper, have this day caused to be served upon the person named below the **Answer** by electronic mail and by placing a copy of same in the United States Mail, postage prepaid, in an envelope addressed as follows:

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/s/ J. Ashley Cooper

This 21st day of January, 2020

Exhibit 1

Exhibit 2

Exhibit 3

Exhibit 4

Exhibit 5

Exhibit 6

Exhibit 7

Exhibit 8